STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF JESSICA COCHRUM, by her Conservator, MARY ANN COCHRUM,

Plaintiff-Appellant,

v

WILLIAM BEAUMONT HOSPITAL,

Defendant-Appellee,

and

CHRIS T. SLOAN, M.D.,

Defendant.

UNPUBLISHED
February 16, 2006

No. 265273
Oakland Circuit Court
LC No. 02-045050-NH

Before: Donofrio, P.J. and Murphy and Kelly, JJ.

PER CURIAM.

In this medical malpractice case, plaintiff appeals as of right the trial court's order granting summary disposition in defendant William Beaumont Hospital's favor. We affirm.

I. Facts

Plaintiff brings this claim on behalf of her daughter Jessica Cochrum for injuries allegedly arising from care plaintiff received from defendant during Jessica's birth. Jessica was delivered with Apgar scores of eight and nine and normal arterial blood gasses. She was discharged in typical post-partum time after an uneventful neonatal course. Nonetheless, Jessica has since been diagnosed as mentally retarded and physically impaired. Plaintiff alleged generally that defendant's physicians committed malpractice by failing to deliver Jessica sooner in light of the factors presented.

In support of her claim that defendant's care caused Jessica's condition, plaintiff offered the testimony of Ronald Gabriel, M.D. who testified that, although there was no evidence at birth of "generalized and global hypoxia ischemia," there was a evidence of a "reduced profusion to the watershed in the fetus, particularly exacerbated during the change in fetal environment with the introduction of Pitocin."

Defendant filed a motion in limine to strike Dr. Gabriel's testimony because his opinion is not scientifically reliable or, in the alternative, for a *Davis-Frye* hearing. After extensive oral argument and review of all the evidence presented, the trial court determined that Dr. Gabriel's watershed injury theory had already been rejected by our Supreme Court and that, while the theory was based, in part, on the effect of Pitocin-induced labor, there was no evidence that Pitocin was used in this case. Because plaintiff had no other causation expert, the trial court granted defendant's subsequent motion for summary disposition on the basis of MCR 2.116(C)(10).

II. Analysis

Plaintiff contends that the trail court abused its discretion in granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). This Court reviews de novo the trial court's decision whether to grant summary disposition. *Moore v Cregeur*, 266 Mich App 515, 517; 702 NW2d 648 (2005). Summary disposition is appropriate under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." When determining whether there is a genuine issue as to any material fact, the trial court must consider the evidence presented by the parties in the light most favorable to the party opposing the motion. *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996).

Underlying plaintiff's assertion that the trial court abused its discretion in granting summary disposition for defendant is her claim that the trial court abused its discretion in striking Dr. Gabriel's testimony. "We review a trial court's decision to admit or exclude evidence for an abuse of discretion." *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004).

The trial court granted summary disposition for defendant because its prior decision to exclude Dr. Gabriel's testimony left plaintiff without an expert witness to testify on the causation element of her medical malpractice claim. To establish a medical malpractice claim, a plaintiff must prove: "'(1) the applicable standard of care, (2) breach of that standard of care by the defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury.'" *Woodard v Custer*, 473 Mich 1, 6; 702 NW2d 522 (2005), quoting *Locke v Pachtman*, 446 Mich 216, 222; 521 NW2d 786 (1994). Generally, expert testimony is required in medical malpractice cases. *Id*. To satisfy the causation element, the plaintiff must show that, but for the defendant's actions, the injury would not have occurred, and that the consequences of the defendant's actions were foreseeable. *Craig, supra* at 86-87.

Plaintiff contends that the trial court's evidentiary ruling was erroneously based on a former version of MRE 702 and on the *Davis-Frye*[1] test for determining the admissibility of scientific evidence. Effective January 1, 2004, MRE 702 was amended. The amended version

[1] *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955); *Frye v US*, 54 App DC 46; 293 F 1013 (1923).

would apply if this case proceeded to trial. See *People v Stanaway*, 446 Mich 643, 692-693 n 51; 521 NW2d 557 (1994). As amended, MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Plaintiff contends that the amended version of MRE 702 conforms to FRE 702, and replaces the *Davis-Frye* test with the test set forth in *Daubert v Merrill Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993). The staff comment to MRE 702 states:

> The amendment . . . conforms the Michigan rule to Rule 702 of the Federal Rules of Evidence, as amended effective December 1, 2000, except that the Michigan rule retains the words "the court determines that" after the word "If" at the outset of the rule. The new language requires trial judges to act as gatekeepers who must exclude unreliable expert testimony. See *Daubert*. The retained words emphasize the centrality of the court's gatekeeping role in excluding unproven expert theories and methodologies from jury consideration.

In *People v Coy*, 258 Mich App 1, 10 n 3; 669 NW2d 831 (2003), this Court held that it was "bound to continue utilizing the *Davis-Frye* test until the Michigan Supreme Court indicates a contrary position." In *Gilbert v Daimler Chrysler Corp*, 470 Mich 749, 781; 685 NW2d 391 (2004), our Supreme Court stated that the amendment of MRE 702 "explicitly" incorporated the *Daubert* standards. Discussing how MRE 702 was amended to conform the Michigan rule to FRE 702 and *Daubert*, the Court stated:

> It is well-established that the proponent of evidence "bears the burden of establishing relevance and admissibility." At the time this case was tried, the proponent of expert opinion evidence bore the burden of establishing admissibility according to the *Davis-Frye* "general acceptance" standard. MRE 702 has since been amended explicitly to incorporate *Daubert's* standards of reliability. But this modification of MRE 702 changes only the factors that a court may consider in determining whether expert opinion evidence is admissible. It has not altered the court's fundamental duty of ensuring that *all* expert opinion testimony--regardless of whether the testimony is based on "novel" science--is reliable.
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> Thus, properly understood, the court's gatekeeper role is the same under *Davis-Frye* and *Daubert*. Regardless of which test the court applies, the court may admit evidence only once it ensures, pursuant to MRE 702, that expert testimony meets that rule's standard of reliability. In other words, both tests require courts to exclude junk science; *Daubert* simply allows courts to consider more than just "general acceptance" in determining whether expert testimony must be excluded.

> This gatekeeper role applies to *all stages* of expert analysis. MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data. Thus, it is insufficient for the proponent of expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine). The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology. [*Gilbert, supra* at 781-782.]

From *Gilbert*, we conclude that MRE 702 incorporates the *Daubert* test into the MRE 702, and replaces the requirement of general recognition with a requirement of scientific reliability, i.e., "reached through reliable principles and methodology." Furthermore, plaintiff, as the proponent of this evidence, bears the burden of establishing its admissibility under MRE 702.

The admissibility of scientific expert testimony is also governed by MCL 600.2955(1), which provides:

> In an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact. In making that determination, the court shall examine the opinion and the basis for the opinion, which basis includes the facts, technique, methodology, and reasoning relied on by the expert, and shall consider all of the following factors:
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> (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
>
> (b) Whether the opinion and its basis have been subjected to peer review publication.
>
> (c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.
>
> (d) The known or potential error rate of the opinion and its basis.
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> (e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.
>
> (f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.
>
> (g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.

In this case, the trial court correctly ruled that plaintiff, in proffering Dr. Gabriel's testimony, failed to sustain the burden imposed by MRE 702 and MCL 600.2955(1). After reviewing the evidence presented by both parties, the trial court concluded that Dr. Gabriel's testimony "is unreliable and is based upon unproven expert theories as well as an erroneous factual basis." In addition to noting that our Supreme Court rejected Dr. Gabriel's watershed theory in *Craig, supra,* the trial court noted that, while Dr. Gabriel opined that the trauma in this case occurred as a result of Pitocin-induced labor, there was no evidence that Pitocin was administered. We conclude that the trial court did not abuse its discretion in ruling that Dr. Gabriel's opinion "is unreliable and is based upon unproven expert theories as well as an erroneous factual basis."

Plaintiff also argues that the trial court should not have granted defendant's motion to strike Dr. Gabriel's testimony without first holding an evidentiary hearing. In *Clerc v Chippewa Co War Mem Hosp,* 267 Mich App 597; 705 NW2d 703 (2005), this Court held that a trial court must not exclude expert testimony under MRE 702 unless it first holds an evidentiary hearing or conducts a "searching inquiry" under MRE 702. In this case, the trial court reviewed what plaintiff characterizes on appeal as "voluminous medical literature provided by plaintiff" and the deposition testimony of Dr. Gabriel. On appeal, plaintiff cites nothing in particular that she would provide in addition if the trial court conducted a hearing. Rather, plaintiff states that, if a hearing were conducted, she "could present testimony from Dr. Gabriel and perhaps other evidence." On this record, we conclude that the trial court conducted a sufficiently "searching inquiry" before striking Dr. Gabriel's testimony. Because plaintiff had no other causation expert, the trial court did not abuse its discretion in granting summary disposition in defendant's favor.

Affirmed.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ Kirsten Frank Kelly